

2. Did the ALJ err by ordering medical treatment and temporary total disability benefits to claimant for the alleged right shoulder injury?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant alleged in her Application for Hearing that she sustained right hand, wrist, elbow and upper extremity injuries as the result of repetitive use of the right arm while inserting inserts into newspapers from February 1, 2011, through April 29, 2011.

Claimant began working for respondent in October 2008, and worked four to five hours a day, five to six days per week. Claimant's job required her to lift boxes of inserts weighing 30 to 35 pounds and place the boxes on tables. The boxes would often be stacked higher than her head, and when they were, claimant would pull them down and put them onto the tables. The inserts in the boxes would be counted into stacks of 25 and placed into the newspapers by claimant, using her fingers and hands. The bundles of newspapers containing the inserts would be placed in stacks over her head. Claimant would then move the bundles of newspapers to a different table and place labels on them for mailing. The bundles were again stacked over her head. The next step was for claimant to place the bundles in mailbags and take them to the post office for mailing. The post office was a block away and, if the weather was nice, claimant would walk to the post office with the mailbags. If the weather was inclement, claimant would use her automobile to transport the mailbags to the post office. Claimant testified that her employment with respondent ended around April 5, 2012, and she received temporary total disability (TTD) benefits from April 6 through October 4, 2012.

Dr. Pat D. Do was authorized to provide medical treatment for claimant's right wrist. Claimant saw Dr. Do for the first time on January 31, 2012, and his records from that visit contained a pain diagram completed by claimant, indicating that she had pain in the right wrist and shoulder. Dr. Do's notes from the January 31, 2012, appointment do not mention complaints of shoulder pain nor a shoulder injury. Claimant testified that she discussed the physical requirements of her job with Dr. Do, including the fact that her job required overhead lifting.

On June 25, 2012, ALJ Barnes issued an Order, approved by the parties, that appointed Dr. Do to determine if claimant's right shoulder condition was work related. Apparently, a preliminary hearing was scheduled, but not held. The Order states in pertinent part:

1. Dr. Pat Do is authorized to evaluate claimant's right upper extremity to determine whether the problems she is having with her right shoulder are as a result of her work-related right wrist injury, and if so, Dr. Do is authorized to provide the appropriate treatment. The prior authorization of Dr. Do as the authorized treating physician for claimant's work-related injury remains in effect.

An August 29, 2012, right shoulder MRI ordered by Dr. Do revealed claimant had an impingement and a partial RTC tear. Claimant was provided with cortisone injections. On November 15, 2012, Dr. Do saw claimant and determined she was at maximum medical improvement for her right wrist only and released claimant to return to work without restrictions with regard to the right wrist. He discussed with claimant the risks and benefits of conservative treatment versus surgical intervention for the right shoulder, and claimant opted for surgery. Surgery was scheduled for December 17, 2012, but was canceled when respondent refused to pay for it. Dr. Do indicated claimant could return to work with temporary restrictions for the right shoulder.

Dr. Do received a letter from William Charles Goodman, a representative of respondent's insurance carrier, with a Physical Demands Analysis attached. The Physical Demands Analysis indicated claimant did no overhead lifting, never lifted over 20 pounds and did no reaching. In a response letter dated November 15, 2012, to Mr. Goodman, Dr. Do opined claimant's right shoulder injury was not related to her right wrist injury. However, he also stated:

The patient, back in August and September of 2012, was telling me she did, over the last year and one-half to two years while employed with Winfield Publishing [respondent], had to do repetitive overhead use. If that history is true, then she would have some compensability to her shoulder because those activities over time can aggravate, accelerate and make active shoulder complaints.

However, reviewing the physical demands analysis that you sent me, if that physical demands analysis is true, that she did no overhead use of her right shoulder, then her work activities would **not** be the contributing factor to her complaints of right shoulder pain.¹

In her April 3, 2013, Order, ALJ Barnes found:

3. On June 25, 2012, both counsel jointly prepared an Order for the Administrative Law Judge's signature. This Order provided as follows: "Dr. Pat Do is authorized to evaluate claimant's right upper extremity to determine whether the problems she is having with her right shoulder are as a result of her work-related right wrist injury, and if so, Dr. Pat Do is authorized to provide the appropriate treatment. **The prior authorization of Dr. Do as the authorized treating physician for claimant's work-related injury remains in effect.** (Emphasis added.)"

4. The parties are now disputing the meaning of the Order as it relates to Dr. Do's authorization. The respondent interpreted the Order to mean that if the right shoulder symptoms are not the result of the claimant's right wrist injury, then no treatment is authorized for the shoulder. As a result, respondent de-authorized shoulder treatment and terminated temporary total disability payments.

¹ P.H. Trans., Resp. Ex. 2.

5. On the other hand, claimant contends that she has established by a preponderance of the evidence that her shoulder injury is work-related even though the shoulder and wrist may not be related. Claimant does not agree with respondent's interpretation of the prior Order.

6. The Court finds that Dr. Do is authorized to treat claimant's work-related injuries to her right upper extremity including the right shoulder. Dr. Do is authorized for all treatment, tests and referrals. Any change to Dr. Do's authorization must be approved by the Court.²

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.³ A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."⁴ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁵

This Board Member affirms the ALJ's implied finding that claimant's right shoulder injury arose out of and in the course of her employment with respondent. Claimant testified that she described her job duties to Dr. Do and that one of her job tasks was to lift bundles of newspapers above shoulder height. This Board Member finds the Physical Demands Analysis Mr. Goodman provided Dr. Do was inaccurate, as it understated the weight claimant lifted and indicated she did not repetitively lift bundles of newspapers above shoulder height. Therefore, this Board Member adopts Dr. Do's opinion that if claimant repetitively lifted above shoulder height, "then she would have some compensability to her shoulder because those activities over time can aggravate, accelerate and make active shoulder complaints."⁶

Respondent asserts the ALJ erred by ordering medical treatment and TTD benefits. This is an appeal from a preliminary hearing. Pursuant to K.S.A. 2010 Supp. 44-551(i)(2)(A), the Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties alleges the ALJ exceeded his or her jurisdiction. In addition K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific

² ALJ Order (Apr. 3, 2013) at 2.

³ K.S.A. 2010 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁴ K.S.A. 2010 Supp. 44-501(a).

⁵ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

⁶ P.H. Trans., Resp. Ex. 2.

jurisdictional issues identified therein. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, payment of medical compensation and payment of temporary total disability compensation. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member affirms that part of the April 3, 2013, preliminary hearing Order entered by ALJ Barnes impliedly finding that claimant sustained a right shoulder injury arising out of and in the course of her employment with respondent. The Board is without jurisdiction to determine whether ALJ Barnes erred in ordering respondent to provide medical treatment and TTD benefits due to claimant's right shoulder injury and, therefore, dismisses respondent's appeal of that issue.

IT IS SO ORDERED.

Dated this ____ day of July, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
joni@jfranklinlaw.com; secretary@jfranklinlaw.com

Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
timothy.emerson@thehartford.com; denise.allen@thehartford.com

Nelsonna Potts Barnes, Administrative Law Judge

⁷ K.S.A. 2012 Supp. 44-534a.

⁸ K.S.A. 2012 Supp. 44-555c(k).